



September 11, 2002

Mr. Joe R. Tanguma
Gary, Thomasson, Hall & Marks, P.C.
P. O. Box 2888
Corpus Christi, Texas 78403-2888

OR2002-5085

Dear Mr. Tanguma:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168443.

The Del Mar College District (the “district”) received a request for information about settlement awards resulting from employment discrimination actions filed against Del Mar College in the last eight years and the amount of one settlement in particular. You state that most of the responsive records are being supplied to the requestor but claim that the information you have submitted for our review is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(18). The submitted information is a settlement agreement contract between Del Mar College and a named individual. Therefore, the submitted document is made public by section 552.022(a)(18). Because this information is subject to section 552.022, it may only be withheld if it is confidential under other law. Section 552.103 is a discretionary exception and is not other law for the purpose of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (litigation exception does not implicate third party rights and may be waived). As you also assert that the submitted information is also excepted from disclosure by sections 552.101 and 552.102, we will address your arguments regarding those exceptions.

You assert that the settlement agreement constitutes “law” that prohibits the release of the agreement.¹ Specifically, you argue that the “settlement agreement between the College and [the named individual] can be construed to preclude the College from releasing any information regarding [the named individual’s] claims of alleged discrimination, including the terms of the settlement agreement.” However, unless authorized by law to do so, a governmental body cannot, by contract or otherwise, promise to maintain as confidential information that is subject to the Public Information Act (the “Act”). Attorney General Opinion H-258 at 3 (1974); *see* Attorney General Opinions JN-672 at 1-2 (1987), JM-37 at 2 (1983); Open Records Decision Nos. 585 at 2 (1991), 514 at 1 (1988), 55A at 2 (1975). You cite to no law that authorizes the district to promise confidentiality with regard to the terms of this settlement agreement, nor are we aware of any. Accordingly, we find that the settlement agreement does not make any of the submitted information confidential for purposes of section 552.101 of the Government Code.

You also assert that the settlement agreement should be excepted from disclosure by section 552.102 in order to protect the personal privacy of the former public employee. Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found.*, 540 S.W.2d at 685. We note, however, that employee privacy under section 552.102 is significantly narrower than common law privacy under section 552.101, because of the

¹Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

greater public interest in the disclosure of information relating to public employees. *See* Attorney General Opinion JM-229 at 2 (1984); Open Records Decision Nos. 470 (1987), 444 (1986), 423 (1984). Generally, section 552.102 protects only that information that reveals "intimate details of a highly personal nature." *See* Open Records Decision No. 315 (1982). Having reviewed the settlement agreement, we find that it does not contain intimate details of a highly personal nature. Furthermore, the fact that a former employee of a governmental body was a victim of discrimination is of legitimate public concern. *See* Open Records Decision Nos. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Accordingly, the settlement agreement may not be withheld under section 552.102 of the Government Code.

We note, however, that the settlement agreement includes a social security number. The social security number of a current or former employee of a governmental body is excepted from disclosure under section 552.117(1) of the Government Code if the employee elected to keep such information confidential prior to the date on which the request for information was received. *See* Gov't Code 552.024; *see also* Open Records Decision Nos. 622 at 5-6 (1994); 455 at 2-3 (1987). However, the governmental body may not withhold this information if the employee failed to request confidentiality under section 552.024 or made such a request after the request for information was received. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989).

Even if the former employee did not make a timely election to keep her social security number confidential, it may nevertheless be confidential in certain circumstances pursuant to the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in the settlement agreement is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the district must withhold the social security number in the submitted settlement agreement if the former employee made a timely election to keep it confidential or if it was obtained or maintained pursuant to a law enacted on or after October 1, 1990. All other information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

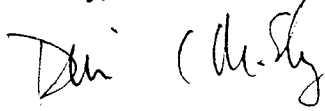
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Den (C. McElroy)".

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 168433

Enc. Submitted documents

c: Ms. Sarah Hanby-Skinner
450 Louisiana Parkway
Corpus Christi, Texas 78404
(w/o enclosures)